IN THE MISSOURI SUPREME COURT

No. SC 83912

CITY OF SPRINGFIELD, MISSOURI
Respondent

v.

THOMPSON SALES COMPANY, et al.,
Appellants

Appeal from the Circuit Court of Greene County, Missouri
The Honorable Calvin R. Holden Presiding

SUBSTITUTE REPLY BRIEF OF APPELLANTS THOMPSON SALES COMPANY, et al.

Stanley J. Wallach #45280
Jerome Wallach #19045
THE WALLACH LAW FIRM
12444 Powerscourt Drive, Suite 250
St. Louis, Missouri 63131
(314) 965-4050
(314) 965-3568 (fax)

ATTORNEYS FOR APPELLANTS
THOMPSON SALES COMPANY, et al.

TABLE OF CONTENTS

Page

Table of Authorities 2

Reply to City's Statement of Facts.....4

Points Relied On.....8

Argument in Reply.....11

Argument One.....11

Argument Two 25

Argument Three.....28

Argument Four.....30

Argument Five.....33

Argument Six.....34

Conclusion.....35

Certificate of Service.....36

Certificate of Compliance.....36

TABLE OF AUTHORITIES

CASE LAW PAGE

Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852 (Mo. banc 1993) 19,20,33

Concord Publishing House, Inc. v. Director of Revenue, 916 S.W.2d 186 (Mo. Banc 1996) 30,31

Ellis v. Union Elec. Co, 729 S.W.2d 71 (Mo.App. 1987).....13,30

Gassen v. Woy, 785 S.W.2d 601 (Mo.App. 1990) 31

In re Estate of McMahon, 729 S.W.2d 67 (Mo.App. 1987) 4

Jones v. Kansas City, 76 S.W.2d 340 (Mo. 1934) 27

Keith v. Burlington Northern Railroad Co., 889 S.W.2d 911 (Mo.App. 1994).....30

Smith v. Wal-Mart Stores, Inc., 967 S.W.2d 198 (Mo.App. 1998).....34

Sparks v. Daniels, 343 S.W.2d 661 (Mo.App. 1961) 19,20

State ex rel. State Highway Comm'n v. Offutt, 488 S.W.2d 656 (Mo. 1972) 18,31

State ex rel. Plan v. Koehr, 831 S.W.2d 926 (Mo. banc 1992) 13

United States v. Cassiere, 4 F.3d 1006 (1st Cir. 1993).....23

RULES

Rule 56.01(b)(4)(a), Mo.R.Civ.P.....31

Rule 70.02(e), Mo.R.Civ.P.....17

Rule 84.04(h), Mo.R.Civ.P.....4

OTHER SOURCES

MAI 2.01.....4,5,12,17,23

33 Mo. Prac. Courtroom Handbook on Mo. Evid.,

§ 614.4 (2000 ed.).....18

Comment, Your Honor, May I Ask a Question? The Inherent

Dangers of Allowing Jurors to Question Witnesses, 7 Cooley

L. Rev. 213 (1990) 24

REPLY TO CITY'S STATEMENT OF FACTS

Certain inaccuracies in the City's[1] Statement of Facts require rebuttal and clarification. Most glaring are claims that the trial judge gave forewarning and an explanation prior to trial about the juror question procedure, and that the judge advised counsel of his proposed modification of MAI 2.01 before reading it to the jury. Both those allegations are erroneous and find no support in the record.

No advance notice and explanation were given about the juror questioning procedure. The City's allegations to the contrary rely exclusively on Appendix B to the City's Brief, which consists of a document provided to the City by the trial judge on October 30, 2001, entitled "Affidavit". City Br. 13. As discussed at greater length in the Thompsons' Motion to Strike and Suggestions in support thereof, the document contained in Appendix B is not properly part of the record and should not be considered by this Court. Mo.R.Civ.P. 84.04(h); In re Estate of McMahon, 729 S.W.2d 67, 70 (Mo.App. 1987)("the after-the-fact affidavit of the trial judge, and other extraneous writings such as affidavits of some of the attorneys in the case, are not properly part of the record and cannot be considered by us….").

The City's claim that the procedure was explained prior to trial is untrue and belied by the record. Had there been a conference in advance of trial

[1] Capitalized terms not otherwise defined have the meaning ascribed to them in the Thompsons' Substitute Brief.

pertaining to the procedure, a record would have been made, given that both parties objected to the experiment imposed upon them by the trial court. Moreover, had the process been explained, the confusion evident in the transcript would have never occurred. *See* TR 576 (trial judge telling counsel: "No. That's not the procedure. We'll go over that in a minute."). Neither the minutes of the proceedings nor the transcript contain any reference to advance explanation of the procedure. There was none.

The City also claims that, after voir dire, the trial judge "advised counsel that the jury would be instructed about the procedure for asking such questions through the use of a modified MAI 2.01." City Br. 13. The City makes no reference to the record to support this statement. A record was made of the discussion among the trial judge and counsel following voir dire on the first day of trial. TR 213 et seq. That portion of the transcript is the only record of any discussion or explanation of the proposed procedure prior to the commencement of the trial. There is no reference whatsoever in that portion of the transcript to MAI 2.01 or to any notice that the judge intended to modify it. The Affidavit recently provided by the trial judge for inclusion in the City's Brief does not even make such a claim. This is because no such notice was given, and no instruction conference was held on the proposed modification.

An additional matter needing clarification is the City's statement that the Thompsons' "new car dealership" was not included in the taking. City Br. 11. All of the ground, buildings, and attached equipment used by the Thompsons to

operate their dealership were, in fact, taken. LF 25-27. Presumably, the City's statement that the "dealership" was not taken refers to any licenses or franchises held by the Thompsons. The Thompsons have never argued that the City condemned their franchise agreements.

The City also states that "at the time of trial the dealership was preparing to move into a new facility" at a different location. City Br. 11. This statement, while true, is misleading – the only reason the Thompsons moved was because of their impending eviction from their property due to the condemnation by the City, not due to any wanderlust or dissatisfaction on the part of the Thompsons. TR 353.

In response to the City's discussion of the actual juror questions, contained in the City's Second Supplemental Legal File, the Thompsons would remind this Court that they did not have the luxury of seeing those questions prior to the time the City filed them with this Court, which was after the filing of the Thompsons' Substitute Brief. As stated in the Affidavit of Mark Fletcher filed in response to the City's Motion to supplement the legal file with the questions, the Thompsons had inquired about the questions prior to submission of this case to the Court of Appeals, and had been told by the trial judge's staff that the questions had been destroyed.

Nonetheless, there does not appear to be a significant variance from the information available in the transcript. The actual number of questions submitted by jurors remains the subject of interpretation, however, depending on how one

characterizes subparts of questions. The Thompsons, the Court of Appeals, and the City have all reached different figures. For example, the Court of Appeals concluded, based upon the transcript, that one juror asked 32 questions of a single witness, Troy Willis. Opinion at 4. Based upon a review of the court exhibits, the Thompsons calculate that the juror submitted 29 questions for Willis, and that two other jurors submitted questions for a total of 33 juror questions for Willis. Second Supplemental Legal File ("2dSLF") 71-76. The City, however, calculates that only 27 questions total were submitted to Willis. City Br. 26. By any calculation, the record reveals that an extraordinary number of questions were submitted by jurors.

POINTS RELIED ON

1. THE TRIAL COURT ERRED IN PERMITTING THE JURORS TO ASK QUESTIONS OF WITNESSES, BECAUSE THE COURT ABUSED ITS DISCRETION IN THE MANNER IN WHICH IT ALLOWED JURORS TO ASK QUESTIONS, IN THAT THE COURT PROVIDED NO GUIDANCE TO COUNSEL ON THE PROCEDURE BY WHICH JUROR QUESTIONS WOULD BE HANDLED, IMPROPERLY AMENDED MAI 2.01 TO PROVIDE FOR SUCH QUESTIONS, CHANGED THE PROCEDURE DURING THE COURSE OF THE TRIAL, PERMITTED JURORS TO INQUIRE OF ALL OF THE THOMPSONS' WITNESSES BUT NOT ALL OF THE CITY'S WITNESSES, AND ACTIVELY ENCOURAGED THE JURORS TO SUBMIT QUESTIONS.

Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852 (Mo. banc 1993)

Ellis v. Union Elec. Co, 729 S.W.2d 71 (Mo.App. 1987)

State ex rel. Plan v. Koehr, 831 S.W.2d 926 (Mo. banc 1992).

United States v. Cassiere, 4 F.3d 1006 (1st Cir. 1993)

2. THE TRIAL COURT ERRED IN DENYING THE THOMPSONS' REQUESTS FOR A MISTRIAL DURING VOIR DIRE, BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO STRIKE THE VENIRE PANEL, IN THAT THE CITY'S REFERENCE TO TAXES AND TO MATTERS PRECEDING THE TRIAL, INCLUDING NEGOTIATIONS AND THE COMMISSIONERS, WERE SO IMPROPER

AND PREJUDICIAL AS TO POISON THE PANEL AND MANDATE A NEW TRIAL.

Jones v. Kansas City, 76 S.W.2d 340 (Mo. 1934)

3. THE TRIAL COURT ERRED IN PERMITTING THE CITY TO ELICIT OPINIONS FROM EARL NEWMAN ABOUT TRAFFIC COUNTS, BECAUSE THE TESTIMONY VIOLATED THE RULES OF DISCOVERY IN THAT EARL NEWMAN WAS NOT DISCLOSED AS AN EXPERT PRIOR TO TRIAL.

Ellis v. Union Elec. Co, 729 S.W.2d 71 (Mo.App. 1987)

4. THE TRIAL COURT ERRED IN PERMITTING THE CITY TO ELICIT OPINIONS FROM FRED WAGNER ABOUT TRAFFIC COUNTS AND TRENDS IN THE RELOCATION OF AUTOMOBILE DEALERSHIPS, BECAUSE THE TESTIMONY VIOLATED THE RULES OF DISCOVERY IN THAT SUCH OPINIONS WERE NOT REVEALED IN THE EXPERT'S REPORT OR DEPOSITION.

Gassen v. Woy, 785 S.W.2d 601 (Mo.App. 1990)

State ex rel. State Highway Comm'n v. Offutt, 488 S.W.2d 656 (Mo. 1972)

5. THE TRIAL COURT ERRED IN PERMITTING THE CITY TO SHOW THE HICKS VIDEO TO THE JURY, BECAUSE THE COURT ABUSED ITS DISCRETION IN THAT JURORS COULD NOT ASK QUESTIONS OF HICKS.

Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852 (Mo. banc 1993)

6. THE TRIAL COURT ERRED IN DENYING THOMPSONS' MOTION FOR NEW TRIAL, BECAUSE THE FOREGOING ERRORS HAD A CUMULATIVE, PREJUDICIAL EFFECT.

DeLaporte v. Robey Bldg. Supply, Inc., 812 S.W.2d 526 (Mo.App. 1991)

ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED IN PERMITTING THE JURORS TO ASK QUESTIONS OF WITNESSES, BECAUSE THE COURT ABUSED ITS DISCRETION IN THE MANNER IN WHICH IT ALLOWED JURORS TO ASK QUESTIONS, IN THAT THE COURT PROVIDED NO GUIDANCE TO COUNSEL ON THE PROCEDURE BY WHICH JUROR QUESTIONS WOULD BE HANDLED, IMPROPERLY AMENDED MAI 2.01 TO PROVIDE FOR SUCH QUESTIONS, CHANGED THE PROCEDURE DURING THE COURSE OF THE TRIAL, PERMITTED JURORS TO INQUIRE OF ALL OF THE THOMPSONS' WITNESSES BUT NOT ALL OF THE CITY'S WITNESSES, AND ACTIVELY ENCOURAGED THE JURORS TO SUBMIT QUESTIONS.

A. The Thompsons were denied justice by the surprise of an unauthorized procedure imposed upon them without warning or explanation.

The City eloquently expounds upon the search for truth as the lofty goal of the civil jury system. The Thompsons humbly reply that they did not go to the courthouse seeking higher truth – they had the more practical expectation of receiving justice. In contrast to the City's pronouncements on the importance of juror questions in the higher pursuit of ultimate truths (despite its opposition to the experiment at the time of trial), the Thompsons submit that the manner in which the procedure was applied deprived them of justice.

The sole issue at trial was the amount of damages to be awarded the Thompsons for the taking of their Property. The governing instructions require the jury to state the result of an imaginary transaction that never did, and never could, happen: what a willing buyer would have paid to a willing seller of the Property on the date of taking. LF 93, 96. This is, of course, a necessary fiction. The trial on exceptions to a commissioners' award is thus not a search for some higher truth, but is rather a procedure to dispense justice by way of a just and civil outcome to a dispute between the government and a citizen. Justice is achieved only through rules requiring each party to carry its respective burden of proof and procedural safeguards designed to ensure a fair and efficient trial.

Here, the Thompsons were denied justice by being subjected to the trial court's experiment without the most fundamental safeguard of our system: advance notice of the rules of the game. The trial judge announced on the morning of trial that he would allow the jurors to interrogate witnesses. The judge provided no explanation of the mechanisms of his innovation. The Thompsons were taken completely by surprise when, at the conclusion of the approved language of MAI 2.01, the judge continued instructing the jury with words of his own creation about juror questioning. This was the first information of any kind provided to counsel on how the procedure would work (though the City's counsel had such information in advance, having previously tried a case before the same judge in which jurors were permitted to submit questions for witnesses).

The City contends that advance notice and guidance were provided to counsel on the procedure. City Br. 34. As discussed above and in the Thompsons' Motion to Strike, this statement is not true, and lacks any support in the record. The City next contends that, in any event, the Thompsons had no right to know the rules of the judge's innovation prior to its implementation at trial. City Br. 37 ("Advance notice of the process was not necessary for counsel to provide input on the juror questioning process"). This proposition flies in the face of the basic concepts of fairness.

There is a reason this Court codifies the Rules of Civil Procedure – to foster efficiency and fairness by advance notice and uniform application of approved procedural mechanisms. A deviation from those Rules, or the imposition upon objecting parties of procedural mechanisms not authorized by those Rules, without notice in advance of trial, results in unfair surprise and defeats the purpose behind the Rules. Discussions of the unfairness of surprise in the discovery process are analogous. *See e.g*. State ex rel. Plan v. Koehr, 831 S.W.2d 926, 927 (Mo. banc 1992)(stating policy behind discovery rules is "to eliminate, as far as possible, concealment and surprise in the trial of lawsuits…."); Ellis v. Union Elec. Co., 729 S.W.2d 71, 75 (Mo.App. 1987)(prejudice may be inferred from surprise at trial of testimony of undisclosed expert). There can be no doubt that the Thompsons were surprised and confused by the unapproved and unexplained procedure imposed upon them. TR 566, 576, 577-82. The unfairness resulting from the surprise warrants a new trial.

B. The judge changed the procedure during trial.

The City contends that the procedure was uniformly applied throughout the trial. This was not the case. Instruction 1 told the jury that each of them should write something for each witness. LF 87. The actual juror questions reveal that, by the end of the trial, only three jurors continued to submit papers following the conclusion of witness examinations by attorneys. 2dSLF 71-81. Thus, the "safeguard" of disguising which juror posed questions by requiring all jurors to write something and pass it to the bailiff was abandoned by the trial court during the progression of the trial.

Instruction 1 also told the jury and counsel that only the jurors' questions would be read. LF 87 ("The attorneys may then ask *the* question of the witness.")(emphasis added). This was the procedure for the first witness. TR 465-67. At the insistence of the City, the court limited the Thompsons' counsel to this procedure for the second witness:

City's Counsel: Excuse me, Your Honor, I thing he's going beyond the question.

The Court: Sustained. Just limit it to the question.

TR 573. But when the City's counsel began asking juror questions of the same witness, the court permitted him, over objection, to go beyond the actual juror's question. TR 577. In a sidebar, the court changed the procedure from reading *the question* as required in Instruction 1 and in the court's ruling on the City's objection at TR 573. The court informed counsel that it would now be

permissible, rather than reading the question as written, to "restate it, lead them up to it … put it in lawyerese and lead them up to it." TR 578-79.

The procedure also changed from having the Thompsons' attorney ask all questions of the Thompsons' first witness, to allowing the City's attorney to grab a juror question and ask it of the Thompsons' second witness. TR 465-67, 566. The discussion at that point in the proceedings reveals the court's inability or unwillingness to maintain a consistent procedure:

City's Counsel: I'll do that.

The Court: It's not your witness, but –

City's Counsel: I don't think that's the point here, is it?

TR 566. The City's counsel was then allowed to read the question he selected. TR 576. The City's contention that the procedure was uniformly applied throughout the trial is thus disproven by the record. In addition to making the Thompsons' counsel appear unprepared, the changing procedure greatly distracted counsel from the task at hand of trying to put on their best case of damages. This prejudiced the Thompsons.

C. The Thompsons' trial strategy and their counsel's performance were detrimentally affected by the juror questioning procedure.

The City claims that the Thompsons' allegation of prejudice is insufficient because the Thompsons do not explain how their trial strategy would have been different had they had advance notice of the procedure. For one thing, counsel could have studied the procedure so that they would have had time to research the

issue and provide more fully developed objections in advance of trial, which may have dissuaded the trial judge from imposing the experiment upon unwilling participants. As things happened, counsel were caught by surprise on the morning of trial, without the benefit of the many authorities pointing out the pitfalls of the procedure. Had the procedure been explained, counsel could have used it more efficiently, and without the need for embarrassing objections, admonishment from the judge, and lengthy sidebars. This would have reduced the delay in the proceedings caused by the procedure, and would have avoided the prejudice of counsel appearing inexperienced or unprepared. It would also have prevented the jury from thinking the Thompsons were delaying the proceedings by asking for sidebars on the issue.

Advance warning would have allowed counsel to inquire of other attorneys with experience with such a procedure, as to strategies to maximize the benefits, if any, of the procedure. Notice would also have provided time to confer with witnesses and prepare them for dealing with juror questions which, obviously, are of a different nature and posed in a far different context from those put to witnesses during cross examination.

Perhaps most importantly, advance notice of the procedure would have avoided the incalculable harm of distracting counsel at trial. Months of preparation go into every aspect of presenting the client's case, and attacking the opponent's case as fully disclosed in discovery. Counsel appear the morning of trial with their work cut out for them, but confident that they are prepared and

know how the case will proceed. To throw a curve at counsel the morning of trial by way of an unexplained procedure distracts counsel from their game plan and adds another level of unnecessary and unfair stress. To allow the procedure to change as the trial progresses deepens that distraction. The Thompsons suffered prejudice because of the surprise of the procedure and its impact on their counsel's ability to focus on presenting their case.

D. The trial court's modification of MAI 2.01 was error, and the Thompsons preserved the issue for appeal.

The City contends that the Thompsons did not preserve their objection to the modification of MAI 2.01 because they did not object at the time Instruction 1 was read to the jury. In response to the Thompsons' argument that no opportunity was given to make an objection in an instruction conference prior to the reading of Instruction 1, as required by the Rules, the City argues that MAI 2.01 is really not an "instruction" subject to Rule 70.02(e). City Br. 54.

Assuming, *arguendo*, that an instruction conference may not be required prior to reading MAI 2.01 in its approved form, that proposition cannot extend to the situation where a trial judge goes beyond the approved language of MAI 2.01 and adds substantive procedures without a prior conference with counsel. The added language empowered and directed jurors to become something different than their traditional role: to join the proceedings as active participants in the interrogation of witnesses rather than determine facts as evidence is elicited by counsel's questions. Nothing could be a more material change in the jury's role.

The Thompsons preserved the issue. Without having been provided the language of Instruction 1, they made their objection to the substance of the instruction at the first opportunity afforded them – the conference after voir dire. TR 216-17. They renewed their objection to the substance of Instruction 1 the second morning of trial, before the Instruction was read to the jury. TR 236-37. They included the error in their Motion for New Trial and in their brief in the Court of Appeals, which found the matter had been properly preserved. Opinion at 5, n.4.

The Thompsons should not be penalized for the trial court's failure to hold an instruction conference prior to reading Instruction 1 to the jury, or for refraining from objecting while the judge read the instruction to the jury. It would have been futile to object once the Instruction was read, in light of the trial court's openly expressed enthusiasm for his innovation. More than that, it would have been suicide to object in front of the jury at the moment the judge bestowed upon them their dramatically new power of inquisition.

Moreover, the City does not, and cannot contend that the Thompsons agreed with the juror questioning process. Both the City and the Thompsons objected to the process on the record during the pre-trial conference. TR at 213-219. This was sufficient to preserve the issue. 33 Mo. Prac. Courtroom Handbook on Mo. Evid., § 614.4 (2000 ed.)("No objection is necessary to preserve improper juror questioning for appellate review"); State ex rel. State Highway Comm'n v. Offutt, 488 S.W.2d 656, 661 (Mo. 1972)("The principle is well established in

Missouri that when a party has duly objected to a certain type of evidence and the objection has been overruled, he need not repeat the objection to further evidence of the same type"). The City's preoccupation with whether the Thompsons objected to this or that particular question posed by a juror is therefore meaningless – having preserved the issue from the outset, the Thompsons had no choice but to try to make the most of the unfortunate situation.

The City's characterization of the closing remarks of the Thompsons' counsel as an expression of "satisfaction with the jury questioning process" is also inaccurate. City Br. 36, TR 1465-66. As the Court of Appeals recognized, these comments did not waive the Thompsons' objections to the process, and were "nothing more than an attempt by Defendants to unring the bell of prejudice via closing argument remarks." Opinion at 14-15, n.5.

E. *Callahan* is not controlling, as it did not reach the issue of whether a court abuses its discretion by actively encouraging juror questions.

The City mistakenly claims that Callahan is controlling. City Br. 32. Callahan is expressly *not* controlling. Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 867 (Mo. banc 1993)(the Court did "not reach the question of whether a trial judge by actively encouraging jurors to ask questions commits an abuse of discretion"). While the City may criticize the proposition that there is a difference between *allowing* and *encouraging* juror questions, this Court in Callahan already recognized the distinction. A comparison of the Callahan and Sparks opinions with the procedure at issue here clarifies that distinction.

In Callahan, it was a juror, not the court, who initiated the process by asking whether jurors could ask questions. Callahan, 863 S.W.2d at 866 (Mo. banc 1993). The trial court did not invite or actively encourage questions from the jurors. Id. at 867. In Sparks v. Daniels, 343 S.W.2d 661 (Mo.App. 1961), the trial court invited jurors to raise their hands if they did not hear or understand what a witness just said. Sparks, 3434 S.W.2d at 663. That is what "allowing" means – allowing a juror to submit a question only if and when the juror wants to ask something, such as when the juror did not hear what was said.

By contrast, the court below invited and actively encouraged jurors to ask questions of each witness on any matter, not just when they failed to hear or understand a witness' statement. Instruction 1, LF at 87. The instruction requests them "to write a question or write something on a sheet of paper after each witness." Id. No juror asked for this privilege. This is what "encouragement" means – proactively telling the jurors to write questions for each witness. In fact, it can be argued that the court went beyond encouragement and actually required jurors to question witness by instructing them to "write something" for each witness. As a result of this encouragement, there were by any count well in excess of 100 questions submitted by jurors, including roughly 30 submitted to one witness by one juror.

F. A trial court abuses its discretion if it actively encourages jurors to ask questions, because such encouragement fosters premature deliberations in violation of MAI 2.01.

The court's encouragement of juror questions amounted to an abuse of discretion. As discussed in the Thompsons' opening Substitute Brief, the encouragement transformed the jurors into active inquisitors, resulted in premature deliberations, and delayed the proceedings. The City claims the Thompsons can point to no particular question to support such arguments. The Thompsons direct the Court's attention to the following questions in the Second Supplemental Legal File, submitted by the City after the Thompsons filed their Substitute Brief:

> If you are the only full-service dealer in Springfield wouldn't it be safe to say you would get similar business based on reputation in a new location? 2dSLF 039.

Through that question the juror injected his or her own opinion of the situation, prior to hearing all evidence, and shared that opinion with the rest of the panel. Many of the questions were in the nature of cross-examination, rather than clarification of facts:

> Why was [sic] other adjoining properties not considered when evaluating the site other than the property to the immediate South in determining the "value" of the Thompson site? 2dSLF 050.
>
> Is it standard practice to leave out a property currently on the market (i.e. Montgomery Property) as a comparison property? 2dSLF 057.

> Is the 8:1 [land to building ratio] an arbitrary number? Could it have been lower? 2dSLF 071.
>
> If the Behlman Property was better located than the Thompson location, why did the owner sell the property after a year of operating the business and dumping more money into it? 2dSLF 078.
>
> Are you telling me that the Hammons Tower & other close properties don't enhance the Thompson property? 2dSLF 080.

These questions are of the type an advocate would ask in cross-examination in order to call into question the credibility or weight of a witnesses testimony. By voicing these questions, the jurors expressed their doubts and conclusions about the testimony and the case prior to hearing all the evidence. Other questions were purely expressions of the jurors' opinions, for example:

> Can we assume the Thompson sites location does not have or need an adjustment, even though the immediate surroundings are what appears to be superior to Lipscombs immediate surroundings? 2dSLF 080.

In that question, the juror is informing other jurors that he or she has concluded the Thompsons' surroundings are superior to another property. At times jurors testified through their questions, as in the following:

> You said you've been to all dealerships – have you been to Youngblood Chrysler? Are you aware that this property is split by Campbell? You said no one else had split property. 2dSLF 072.

That juror, in addition to voicing his skepticism about the witness' testimony, expressed facts of his own knowledge and shared them with his fellow jurors, rather than relying on the evidence as presented in court.

While it may be impossible to measure the impact such premature deliberations had upon the outcome of the trial, it cannot be denied that such deliberations and communications took place through the juror questioning procedure. The Thompsons respectfully submit that this is a direct conflict with the civil rules as embodied in MAI 2.01, and that, because premature deliberations were permitted and encouraged by the trial judge, they deserve a new trial.

G. This case was not so exceptionally complex as to justify the use of a juror questioning procedure.

The City argues that the complexity of the case and the amount of expert testimony involved rendered it particularly suitable for juror questions. City Br. 43. This is exactly the opposite of the position advanced by the City at trial, in which it opposed juror questions because of the expert testimony that would be given. TR 214. The Court of Appeals found that the case was not particularly complex. Opinion at 14. While the case was extremely important to the Thompsons, it was relatively straightforward, involving only the question of what someone would have paid for their dealership property. In terms of complexity, it was not the sort of exceptional situation that would mandate use of juror questioning to facilitate understanding. United States v. Cassiere, 4 F.3d 1006,

1018 (1st Cir. 1993)(the process "should be reserved for exceptional situations, and should not become the routine, even in complex cases.").

H. A revolutionary innovation such as the procedure at issue should be implemented, if at all, from above rather than developed on an ad hoc basis at the trial court level.

The City cites guidelines for juror questioning promulgated in other states, and includes some of them in its Appendix E. It is worth noting that the cited guidelines are codified, often by statute. A008-A014. The Thompsons submit that, if a detailed procedure such as the one used below is to be allowed in Missouri state courts, guidelines should be established from above, either by Supreme Court Rule or statute, as done in those states referred to in the City's Brief. *See* Comment, Your Honor, May I Ask a Question? The Inherent Dangers of Allowing Jurors to Question Witnesses, 7 Cooley L. Rev. 213, 225 ("Such changes demand a great deal of deliberation, rather than developing haphazardly or on an ad hoc basis. Perhaps, the appropriate forum to decide the viability and scope of the practice is the legislature."). This is preferable to the trial by error approach used below. In addition to providing a uniform system for use in trial courts statewide, guidelines codified by rule or statute provide the advance warning so glaringly absent in this case.

Because the trial court abused its discretion in actively encouraging juror questions and in the manner in which it applied the procedure, this Court should reverse and remand for a new trial.

2. THE TRIAL COURT ERRED IN DENYING THE THOMPSONS' REQUESTS FOR A MISTRIAL DURING VOIR DIRE, BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO STRIKE THE VENIRE PANEL, IN THAT THE CITY'S REFERENCE TO TAXES AND TO MATTERS PRECEDING THE TRIAL, INCLUDING NEGOTIATIONS AND THE COMMISSIONERS, WERE SO IMPROPER AND PREJUDICIAL AS TO POISON THE PANEL AND MANDATE A NEW TRIAL.

The City claims that its statements in voir dire were designed to determine if anyone believed they had a personal stake in the outcome of the trial. City Br. 60. The fear of a juror's own taxes going up as a result of an award to the Thompsons was, of course, injected into the case by the City's question: "Now there may be somebody on the panel that feels like well, look, if I award Thompsons this money, my taxes might go up as a – " (TR 124-25). The City cannot seriously contend that injecting the possibility of the jurors' own taxes increasing as a result of a damages award could help select an unbiased jury. It is as inappropriate as emphasizing insurance in a tort case by asking if any juror fears his insurance premiums will rise as a result of a damages award. The issue of taxes has no bearing whatsoever on the question to be decided in a condemnation action. The comments were calculated to have an effect on the venire panel, and did as evidenced by the low verdict.

The impropriety of the comments is self evident. The real question presented is whether the trial court's sustaining of the Thompsons' objections was sufficient, or whether the court should have ordered a mistrial as requested by the Thompsons. The court took the Thompsons' motion for a mistrial under advisement until after the close of evidence, at which time the court denied the motion. TR 234, 1456.

The City argues that the Thompsons should have availed themselves of alternative remedies of a "corrective instruction" or "some other affirmative action" allegedly offered by the trial court. City Br. 60. The City's description of the record on this issue is not entirely accurate. At the page of transcript cited by the City, the court asked: "Now do you want me to say anything, other than that I have sustained your objections and Mr. Cowherd, you shall continue on with another line of remarks." TR 130. The court announced to counsel that the "objection is sustained and proceed on with another line of questioning, that's all I plan on saying." Id. The trial court thus did not offer a corrective instruction or reprimand as now alleged by the City, but only asked the Thompsons' counsel if they wanted to request anything other than a mistrial. Counsel for the Thompsons made no alternative request. They believed at the time, and continue to believe, that there was no magic word that could unring the bell. Once the specter of taxes was wrongfully brought into the courtroom by the City, it could not be dispelled. The Thompsons demanded the only appropriate remedy, a mistrial, so that a new

trial could be commenced with a panel unspoiled by the City's improper comments.

The City claims that its improper comments did not prejudice the Thompsons. The inflammatory and prejudicial impact of the comments, however, is obvious. Pre-trial negotiations, the commissioners' proceedings, the alleged greediness of landowners involved in the project, and the issue of taxes are entirely extraneous to the issue on trial – the value of the Thompsons' property. The Missouri Supreme Court long ago condemned such inflammatory tactics: "the conduct of counsel in so designedly pressing upon the attention of the jury a matter wholly extraneous to the case for the inferentially admitted purpose of gaining a verdict was highly improper." Jones v. Kansas City, 76 S.W.2d 340, 341 (Mo. 1934).

Standing alone, the misconduct and error during voir dire provide grounds for reversal and a new trial. Viewed as the opening scene in the drama of a trial fraught with surprise and error, the voir dire in this case serves as a major element of the cumulative, prejudicial effect of the errors below.

3. THE TRIAL COURT ERRED IN PERMITTING THE CITY TO ELICIT OPINIONS FROM EARL NEWMAN ABOUT TRAFFIC COUNTS, BECAUSE THE TESTIMONY VIOLATED THE RULES OF DISCOVERY IN THAT EARL NEWMAN WAS NOT DISCLOSED AS AN EXPERT PRIOR TO TRIAL.

The City's contention that Newman was not an expert is belied by the voir dire examination. He testified that the preparation of traffic counts requires special training, special direction, and expertise. TR 1033-34. If the City's argument that Newman was merely a records custodian is accepted, then any expert testimony may be sprung on an opponent at trial simply by placing the expert's report in the client's business records. The City could not have dodged discovery of its appraisers' opinions by filing appraisal reports with the City Clerk or Assessor and then calling a records custodian to admit them. It should not have been able to achieve the same result with regard to Newman's testimony on traffic counts.

The City's characterization of remedies available to the Thompsons at trial overstates the usefulness of opportunities afforded them. Trying to make the best of a terrible situation, the Thompsons accepted the court's offer to depose Newman over lunch. TR 1037. The reason no deposition occurred was that the City insisted it could not delay putting Newman on the stand. TR 1037-38. The only remedy then offered for dealing with the surprise was a brief, informal interview outside the courtroom, after which the Thompsons renewed their

objection. TR 1041. The Thompsons' counsel made clear that the interview was not a satisfactory substitute for pre-trial discovery. Id.

Newman's testimony had an impact on the jury. In addition to questioning Newman about traffic counts, more than one juror would subsequently tender questions to two following witnesses about traffic counts and patterns. 2dSLF 068, 069, 073. This issue, which obviously caught the attention of the jury, was not injected into the case until the surprise appearance of Newman. The Thompsons, lacking advance notice that the issue would be presented, were prejudiced in that they could not balance the scales of the case with a traffic expert of their own and appraisal testimony on traffic counts and trends.

The trial court's offer to allow the Thompsons to reopen their case with their own traffic expert was meaningless. That offer came on the fifth day of a trial that demanded the full attention and participation of both trial counsel for the Thompsons. No search for, selection or preparation of a rebuttal expert witness could possibly have been accomplished at that stage in the proceedings.

The surprise of Newman could have been avoided, had the City complied with the rules of discovery and disclosed him prior to trial. This was pointed out below, when counsel for the Thompsons stated:

> I would have anticipated that I would have known about this witness last week. If I had known, we could have hashed this out, there probably wouldn't be any problem. But here we are in the middle of a trial, on the

fifth day, and a dark horse witness walks in the room. I've never seen him. I've never heard of him. I don't know what he's going to put in.

TR 1046. The prejudice from such surprises is inferred. Ellis, 729 S.W.2d at 75. This was another surprise that, with the others, denied the Thompsons a level playing field and deprived them of a fair trial.

4. THE TRIAL COURT ERRED IN PERMITTING THE CITY TO ELICIT OPINIONS FROM FRED WAGNER ABOUT TRAFFIC COUNTS AND TRENDS IN THE RELOCATION OF AUTOMOBILE DEALERSHIPS, BECAUSE THE TESTIMONY VIOLATED THE RULES OF DISCOVERY IN THAT SUCH OPINIONS WERE NOT REVEALED IN THE EXPERT'S REPORT OR DEPOSITION.

The record does not support the City's claim that the Thompsons waived their objections to Wagner's testimony. Counsel for the Thompsons objected often to the testimony, and the court recognized the objection as continuing. TR 1345. The City's reliance on Keith v. Burlington Northern Railroad Co., 889 S.W.2d 911 (Mo.App. 1994) and Concord Publishing House, Inc. v. Director of Revenue, 916 S.W.2d 186 (Mo. banc 1996) is misplaced. In Keith, the defendant Railroad argued for the first time on appeal that the trial court should have stricken the testimony of plaintiff's economic expert. Keith, 889 S.W.2d at 922. There is no indication that any objection was made at trial. The court of appeals held that, because the defendant did not move to strike below, it could not complain on appeal that the testimony should have been stricken. Id. In Concord Publishing,

the party complaining on appeal about the admission of hearsay evidence below made no objection during the hearing, and so could not challenge the evidence on appeal. Concord Publishing, 916 S.W.2d at 195-96. Here, the Thompsons objected to Wagner's testimony, which objection was recognized as continuing. TR 1345. This is sufficient to preserve the matter for appeal. State ex rel. State Highway Comm'n v. Offutt, 488 S.W.2d 656, 661 (Mo. 1972).

On the merits, the City's claim that Wagner was merely a fact witness on dealership trends does not rebut the Thompsons' claim of surprise. Wagner's "observations" about the relocation of dealerships were tied directly to his evaluation of the Property. TR 1347. As such, the observations were part of his opinion, which had to be disclosed prior to trial. Mo.R.Civ.P. 56.01(b)(4)(a); Gassen v. Woy, 785 S.W.2d 601, 604 (Mo.App. 1990)(sponsoring party must disclose new or different facts to be used by an already deposed expert).

The City's contention that Wagner's testimony on traffic counts and dealership trends was "merely cumulative" disregards the purpose and context in which the testimony was given. Wagner's observations were offered solely for the purpose of laying the foundation for his opinion and making that opinion seem credible. The fact that other witnesses may have testified to traffic counts does not make Wagner's testimony cumulative – their testimony was not wedded to Wagner's opinion. Wagner's "observations" were. As such, Wagner's observations should have been excluded as they were not disclosed in discovery.

The City contends that the complained of portion of Wagner's testimony was disclosed. The City attaches an Appendix G to its Brief to support this contention. The Thompsons respectfully submit that this Court should disregard Appendix G, as it is not contained in the Legal File, has no reference to the Transcript, and is not a document identified as an exhibit or admitted into evidence at trial. The Thompsons have sought the documents exclusion in their Motion to Strike.

In any event, the document does not serve as a warning that Wagner would testify as an expert on dealership trends or traffic counts, and none of his verbal deposition testimony revealed any opinions on those issues. At trial, the City's counsel admitted that the matters were not disclosed in the report. TR 1343. In addition, the colloquy that occurred at trial went far beyond anything disclosed in deposition or in the pages included in Appendix G, discussing a "trend", information a buyer might rely on, and the consideration of the trend in valuing the Thompson property. TR 1345-47. The City points to no notice in advance of trial that Wagner would tie a perceived trend in dealership relocation directly to the value of the Thompson Property as he did at trial.

It is worth noting that the City's counsel, who had a copy of Wagner's materials, did not argue at trial that the matters had been disclosed in discovery. When the Thompsons objected, the City responded that Wagner was a fact witness on those issues. TR 1342. As discussed above, when an expert testifies to facts in

order to support his opinion, the other side must fairly be advised of those facts in advance of trial.

As on the other points, the City argues that the Thompsons suffered no prejudice. Prejudice is inferred in surprises, and occurred here. The Thompsons had no advance warning that traffic counts would be linked directly to opinion testimony on the value of their Property. They were thus unprepared to balance the presentation by putting on their own expert testimony on the issue. As such, they were denied a fair trial.

5. THE TRIAL COURT ERRED IN PERMITTING THE CITY TO SHOW THE HICKS VIDEO TO THE JURY, BECAUSE THE COURT ABUSED ITS DISCRETION IN THAT JURORS COULD NOT ASK QUESTIONS OF HICKS.

The City argues that the Thompsons point to no authority on the issue of whether juror questioning should be allowed in the event a witness will testify by video or deposition. The City, however, points to no authority to support its position that juror questioning is to be allowed under such circumstances. This is not surprising, given no Missouri court has addressed the issue. Callahan cannot be said to support the City's position, given that it was expressly limited to the facts before it. Callahan, 863 S.W.2d at 867.

The Thompsons respectfully suggest that the Civil Rules serve to ensure that both sides of a dispute get a level playing field. Any alteration of procedure that makes the playing field uneven should not be allowed. Here, there can be no

question that the juror questioning procedure was unbalanced – each of the Thompsons' witnesses faced juror interrogation, while not every one of the City's witnesses did. The City contends that this disparity was more likely to hurt the City, and refers to the trial court's opinion to that effect. TR 217. But such argument assumes there is prejudice underlying the disparity, and merely speculates as to the victim.

Due to the disparity of treatment of live versus videotaped witnesses, the trial court should have either prohibited juror questioning, or prohibited non-live testimony. By allowing both, the court abused its discretion and created an uneven playing field to the Thompsons' detriment.

6. THE TRIAL COURT ERRED IN DENYING THOMPSONS' MOTION FOR NEW TRIAL, BECAUSE THE FOREGOING ERRORS HAD A CUMULATIVE, PREJUDICIAL EFFECT.

The City does not dispute that cumulative error can provide grounds for reversal, and in fact discusses case recognizing that principle. DeLaporte v. Robey Bldg. Supply, Inc., 812 S.W.2d 526 (Mo.App. 1991); Smith v. Wal-Mart Stores, Inc., 967 S.W.2d 198 (Mo.App. 1998). Rather, the City contends that none of the incidents discussed by the Thompsons constituted prejudicial error. The Thompsons disagree, and have included the cumulative error claim in their appeal so that, in the event this Court concludes that any one of the trial court's errors, standing alone, may not mandate reversal, the Court could nonetheless reverse based on the whole picture. It is respectfully submitted that the whole picture is

one of surprise and error that created an uneven playing field, denying the Thompsons their right to a fair trial. This Court should therefore reverse on the basis of cumulative error.

CONCLUSION

For the foregoing reasons, and for those stated in their opening Brief, the Thompsons respectfully request that this Court reverse and remand for a new trial.

THE WALLACH LAW FIRM

BY: _____

STANLEY J. WALLACH #45280
JEROME WALLACH #19045
Attorneys for Appellants
12444 Powerscourt Drive,
Suite 250
St. Louis, Missouri 63131
(314) 965-4050
(314) 965-3568 (fax)

CERTIFICATE OF SERVICE

A copy of the foregoing brief and a disk containing the brief were served via Federal Express, overnight delivery, on November 15, 2001, on: Charles Cowherd and JoAnn Tracy Sandifer, Husch & Eppenberger, LLC, 750 N. Jefferson, Springfield, Missouri 65802.

Stanley J. Wallach

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Substitute Brief of Appellant complies with the requirements contained in Rule 84.06(b). Relying on the word count of the Microsoft Word program, the undersigned certifies that the number of words contained in the Substitute Brief, excluding the cover page, certificate of service, signature block, and certificate of compliance, is 7,575. Furthermore, the disk filed herewith has been scanned for viruses and is virus free.

Stanley J. Wallach, #45280
THE WALLACH LAW FIRM
Attorneys for Appellants
12444 Powerscourt Drive, Suite 250
St. Louis, Missouri 63131
(314) 965-4050
(314) 965-3568 (fax)